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IN THE

Supreme Court of the United States.

No. 545. October Term, 1928.

STANDARD OIL COMPANY AND SINCLAIR REFINING COMPANY,
Petitioners,

v.

CITY OF MARYSVILLE, ET AL.,
Respondents.

BRIEF ON BEHALF OF AMERICAN PETROLEUM INSTITUTE AND THE ATLANTIC REFINING COMPANY, AS AMICI CURIÆ.

This case is of great interest to the general public and of exceptional importance to the petroleum industry.

The American Petroleum Institute, intervening with the permission of the Court as an amicus curiae, was formed for the following objects: (a) to afford a means of co-operation with the Government in all matters of national concern; (b) to foster foreign and domestic trade in American Petroleum products; and (c) to promote in general the interests of the petroleum industry in all its branches; and (d) to promote the mutual improvement of its members and the study of the arts and sciences connected with the petroleum industry. Its membership includes representatives of practically all of the large producers, refiners and distributors of petroleum products.

The industry itself is of no mean magnitude. The American production of oil in 1928 was about 900,000,000 barrels or 37,800,000,000 gallons. The entire investment in the industry is about eleven billion dollars. The petroleum

refining industry, in 1925, the last census year, ranked fourth in the value of production of manufactures. The railroads of the United States transport a larger tonnage of petroleum products than of any other manufactured commodity. Petroleum ranks first in exports of manufactures from the United States. In 1927 it supplied four hundred and eighty-six million dollars towards a favorable trade balance. The industry employs one million persons. The principal product of the industry, gasoline, has become an everyday necessity. Ten years ago there were only 7,500,000 cars. Now there are 24,750,000 cars in this country out of a total world registration estimated at less than 32,000,000 motor vehicles. This essential product is stored throughout the country in order to be everywhere available. Over 400,000 homes are now equipped with oil furnaces, in addition to more than 33,000 commercial oil burners for the heating of large apartments, office buildings, theatres, schools and similar structures.

The decree below upheld an ordinance requiring petroleum tanks to be placed under ground. The Master who heard the case found that storage below ground was more dangerous than storage above ground. The District Court approved his finding. The Court of Appeals (Phillips, *D. J.*, dissenting) reversed that finding.

Pennsylvania, the pioneer state in petroleum, with the earliest if not the most extended experience, has held void an ordinance prohibiting the storage of gasoline and kerosene in quantities in excess of 400 gallons:

> Manorville Borough v. Flenner, 286 Pa. 103 (1926).

That case came before 14 judges of the Common Pleas, Superior and Supreme Courts of Pennsylvania, and there was no dissent.

Whatever police power is delegated by the legislature to municipalities is subject to the inherent limitation that it must be reasonably exercised.

The reasonableness or unreasonableness of an ordinance must turn upon the decision of questions of fact, and the ordinance itself is far from conclusive of its own reasonableness. It should not prevail against the well considered judgment of a nation-wide industry, based upon expert research and fortified by extended experience.

The case at bar is unlike any other case in that the overwhelming weight of the evidence is to the effect that to comply with the ordinance will *increase* the hazard in the storage of petroleum products. Such an ordinance, though it may conform to local prejudice, is contrary to the practice of the industry and the considered judgment of those best qualified to know.

The findings of the Master, approved by Judge Pollock and concurred in by Judge Phillips, were correct and demonstrate the unreasonableness of the ordinance.

It is the practice of the oil industry, in accordance with the judgment and practical experience of those who have spent their lives in the business, to place large kerosene and gasoline containers above ground. The tanks now in question belonging to the Sinclair and Standard Companies, of some 12,000 gallons and upwards, come within the category of large storage customarily so placed. These tanks had been safely maintained and operated in the City of Marysville for 14 and 20 years respectively. The Standard Oil Company alone owns and maintains 12,000 large tanks similar to those now in question. The total refining stocks on hand in the United States of kerosene and gasoline on December 31, 1928, were 9,000,000 barrels and 33,000,000 barrels respectively or 1,764,000,000 gallons. It may be safely said that by far the larger proportion of these enormous quantities is stored in large tanks above ground.

A careful analysis of the evidence, the qualifications of witnesses, the overwhelming weight thereof and the law applicable thereto, will be found in the petitioners' brief, p. 40, et seq.

The testimony demonstrates that:

1. Leakage is more likely to occur in large tanks underground than in tanks maintained above ground

(a) Because of corrosion;

(b) Because of strain upon the seams and rivets of the tank incident to the installation thereof for use underground.

(c) A leaking tank cannot be repaired underground; it must first be dug up and brought to the surface.

(d) Underground tanks are liable to develop ruptures and leaks caused by expansion and contraction.

(e) Underground tanks are liable to be flooded out by water breaking connections.

(f) Leaks from large underground tanks cannot readily be discovered, because of difficulty of making accurate measurements.

(g) Underground tanks cannot be cleaned out or inspected.

2. Leakage from an underground tank is more dangerous than leakage from an aboveground tank because

(a) No evaporation;

(b) Cannot be controlled;

(c) Cannot be discovered before actual disaster occurs.

3. Properly installed large overground tanks by reason of their nature and construction cause less hazard of fire or explosion than underground tanks.

4. Storage of gasoline and other petroleum products, even in unlimited quantities, in properly constructed and equipped tanks, is not dangerous to life and property, and such products have and can be, and are so stored without appreciable danger therefrom.

The Court below completely rejected the approved findings of the Master, saying

> ". . . the expert testimony of chemists and fire and water chiefs was conflicting. . . . The most that can be said in favor of the finding of danger in this respect (seepage) is that it is a debatable question."

and again

> "It is also apparent from the experience of the Fenwick Oil Company that the difficulties attending the installation, maintenance and operation of tanks underground are not insuperable."

The majority opinion below merely states conclusions, and we have not the benefit of knowing how the conclusions are reached. We submit that a correct analysis of the testimony shows no real conflict or ground for debate. Those really expert sustained the propositions hereinbefore stated. The reliance placed by the majority opinion upon the "experience" of the Fenwick Oil Company is typical. Its president said that their large tanks have been under ground for two years, in compliance with the ordinance, and that no leakage or other evil consequences has resulted. No one has suggested that leakage would occur in every tank every year. Natural laws, however, continue to operate, notwithstanding municipal ordinances. Corrosion, strained seams and rivets from burying a huge steel structure, ruptures and leaks from expansion and contraction, impossibility of inspection or repair under ground, these are some of the physical facts which, in the settled judgment of the industry, preclude the burying of large tanks. Even

> "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. Lawton v. Steele, 152

U. S., 133, 137. Adams v. Tanner, 244 U. S., 590, 594. Meyer v. Nebraska, 262 U. S., 390, 399-400. Burns Baking Co. v. Bryan, 264 U. S., 504, 513. Norfolk Ry. v. Public Service Comm'n, 265 U. S., 70, 74. Pierce v. Society of Sisters, 268 U. S., 510, 534-535. Weaver v. Palmer Bros. Co., 270 U. S., 402, 412, 415. Tyson & Brother v. Banton, 273 U. S., 418, 442."

Seattle Trust Co. v. Roberge, 278 U. S., 121 (1928).

The case at bar was carefully considered in the dissenting opinion of Phillips, *D. J.* He said:

"I therefore am of the opinion that the conclusion is inevitable, that gasoline escaping through leakage from underground tanks, regardless of the imperviousness of the soil would probably travel to pockets, cracks, sewers, cellars and like places, as testified to by the witnesses for the appellees.

The fact that the witnesses for the appellees base their opinions and conclusions upon knowledge gained through practical and extensive experience, the fact that they gave such cogent reasons for their conclusions, and the fact that the conclusions of the witnesses for the appellants were largely theoretical and not based on practical knowledge and experience, lead me to the conclusion that the evidence on this controverted point clearly and satisfactorily established that the provisions of the ordinance, instead of tending to promote the public safety, tended in the opposite direction, and that compliance therewith would increase, instead of decrease, the hazard from fire and explosion resulting from the storage of gasoline and like substances in large quantities. If this be true, the findings above quoted, made by the Master and confirmed by the trial Court, should be adopted by this Court.

If these findings are true the ordinance in question is not reasonably calculated to accomplish its intended purpose, and is therefore unreasonable and void."

The findings and conclusions of a Master, concurred in by the trial Court, are to be taken as presumptively correct, and cannot be set aside except for clear error.

Paulus v. Buck Manufacturing Company, 129 Fed. 594 (1904);
Tilghman v. Proctor, 125 U. S. 136 (1887);
Kimberly v. Arius, 129 U. S. 512 (1888);
Crawford v. Neal, 144 U. S. 585 (1891);
Furrer v. Ferris, 145 U. S. 132 (1891);
Munn v. DesMoines Nat'l Bank, 18 Fed. (2d), 269 (1927).

In the case of Munn v. DesMoines Nat'l Bank, *supra*, the Court (Sanborn, *J.*) said (p. 270):

"We have carefully read the brief of counsel upon these subjects and have examined the evidence in the record, which contains the testimony of more than 200 witnesses, and we are convinced that there was ample evidence before the master and the court below to sustain their findings and conclusions. *The finding of a special master who takes the testimony and sees the witnesses upon conflicting evidence in a suit in equity, and which is subsequently reviewed and confirmed by the chancellor, is buttressed by a very strong legal presumption, and it ought not to be reversed or modified by an appellate court, unless some serious or important mistake of fact has been made in the consideration of the evidence, or a controlling error of law has been committed in the application of the law to the case.* We find neither in this case. Tilghman v. Proctor, 125 U. S. 136, 8 S. Ct. 894, 31 L. Ed. 664; Warren v. Keep, 155 U. S. 265, 267, 15 Sup. Ct. 83, 39 L. Ed. 144; Crawford v. Neal, 144 U. S. 585, 596, 12 S. Ct. 759, 36 L. Ed. 552; Moffatt v. Blake (C.C.A.) 145 F. 40, 41; Coder v. Arts (C.C.A.) 152 F. 943, 946, 15 L.R.A. (N.S.) 372; Boswell Nat. Bank v. Simmons, (C.C.A.) 190 F. 735, 736; Paulus v. Buck Mfg. Co. (C.C.A.) 129 F. 594, 597."

The syllabus in Furrer v. Ferris, *supra*, is as follows:

"The findings of a master in chancery, concurred in by the court, are to be taken as presumptively cor-

rect, and will be permitted to stand unless some obvious error has intervened in the application of the law or some important mistake has been made in the evidence, neither of which has taken place in this case."

The Circuit Court of Appeals recognized this well established principle of law (R., p. 434), but failed to apply it, because of a supposed "debatable" conflict of testimony, because of which ". . . the legislative judgment must prevail."

While the burden of proof to show the unreasonableness of the ordinance was upon us *the rule is not that there must be no conflict in the evidence, but that it is sufficient if the unreasonableness of the ordinance be established by clear and satisfactory proof.*

43 C. J. p. 312, Sec. 325.
Standard Oil Co. v. Kearney, (Nebr.) 184 N. W. 109 (1921).
Weaver v. Palmer, 270 U. S. 402 (1926).

In the latter case, the Court said:

"Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. . . . Invalidity may be shown by things which will be judicially noted . . . *or by facts established by evidence.*"

The Director General of Railroads adopted a ruling requiring all racks for refinery gasoline, benzine and naphtha to be placed at least 80 feet away from the main tracks or a track over which trains are frequently run. For casing head gasoline the loading rack was required to be located at a distance not less than 100 feet. Bills were filed to restrain the enforcement of this rule at Cornwallis, West Virginia, and Sistersville, West Virginia. The contract contained a clause authorizing the railroad company to discontinue the use of a siding and remove the

siding if in its opinion it "is not justified in continuing said side-track because it will interfere with the proper operation of said railroad." It was held that the railroad company was not authorized arbitrarily to refuse to furnish cars for use of the shipper on said side-track without submitting to a judicial determination of the reasonableness of such proposed action:

Hines v. Hennigan, 265 Fed. 831 (1920);
Hines v. Atlantic Refining Co., 265 Fed. 839 (1920).

The crusade against the location of gasoline loading racks was subsequently abandoned. Such racks are now located in various places as near as 40 feet from the main line.

The rules of the American Railway Association now in force, revised to February 19, 1925 (whose then officers included R. H. Aishton, W. G. Besler, Hale Holden, Alfred P. Thom and H. J. Forster) provide that tanks containing 18,001 to 30,000 gallons of gasoline, benzine, naphtha, casinghead gasoline or any liquid with flash point below 30 degrees Fahrenheit, must be located at least 40 feet from the track over which passenger trains are moved. There is no requirement that tanks be placed under ground.

Ignorance and prejudice, crystallized into an ordinance, must yield to experience and expert knowledge.

The Court will take judicial notice of the extent and importance of the petroleum industry and of the adequate way in which it has met with the manifold problems connected with production, transportation, refining, storage and distribution. Those best qualified to speak as to wise, sane and safe methods and practices are those charged with the knowledge which comes of long experience. Unless the industry can be charged with acting in bad faith, its assertion of a long continued practice or custom, based upon actual experience and really expert knowledge, is entitled to great weight.

The industry is alive to its responsibility. Its care and vigilance grow out of the competitive and economic urge, and it records its conviction that the method adopted by the industry, and sanctioned by long and uniform usage in the storage of gasoline in large quantities, safeguards the public interest and is the sound answer to the problem.

Respectfully submitted,

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